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In The

# Supreme Court of the United States

GEORGE WYSOCKI,

*Petitioner,*

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION dba IBM, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) provides broad protections for noncareer military service persons in the civilian workplace. A key component of USERRA is 38 U.S.C. § 4302(b) which requires that rights and benefits under USERRA not be diluted or eliminated by contract or agreement. USERRA allows any "contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter." 38 U.S.C. § 4302(a). In 2005, the Department of Labor issued regulations implementing the statute, 20 C.F.R. Pt. 1002. Pertinent to contracts and agreements, the regulations confirm that "USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects." 20 C.F.R. 1002.7(a). However, "[i]f an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights provided by USERRA." 20 C.F.R. 1002.7(d).

The question presented is:

May the terms of an employment severance agreement bar a military service person's claim for reemployment rights and benefits under USERRA notwithstanding the plain text of 38 U.S.C. § 4302?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, George Wysocki, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The decision of the court of appeals is reported at 607 F.3d 1102 and is reproduced in the Appendix at 1-20. The decision of the U.S. District Court for the Eastern District of Kentucky is unreported and is reproduced in the Appendix at 21-32.

## JURISDICTION

The opinion and judgment of the court of appeals were filed on June 16, 2010. Pet. App. 1-20. The order denying petitioner's timely petition for rehearing en banc was entered on August 13, 2010. *Id.* at 33. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

This case involves the construction and application of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301, *et seq*.

Section 4302(b) of 38 U.S.C., provides that USERRA supersedes any contract or agreement which in any way reduces or eliminates rights or benefits owed to non-career military service personnel under the Act:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

Section 4302(a) of 38 U.S.C., permits contracts and agreements which provide rights and benefits greater than those under USERRA:

> Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

Section 4303(2) of 38 U.S.C., defines "benefit" and "rights and benefits":

> The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary

> for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

Section 4311(a) of 38 U.S.C., prohibits discrimination in initial employment, reemployment and retention in employment:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Section 4316(a) of 38 U.S.C., confers the following rights and benefits upon reemployment:

> A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have

> attained if the person had remained continuously employed.

Section 4316(c) of 38 U.S.C., prohibits discharge of a reemployed service person except for cause under the following circumstances:

> A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause – (1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

Section 4323 of 38 U.S.C., allows a reemployed service person a cause of action for monetary damages and equitable relief for a violation of USERRA. Section 4323(d) states in pertinent part:

> Remedies. – (1) In any action under this section, the court may award relief as follows: (A) The court may require the employer to comply with the provisions of this chapter. (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter. (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court

> determines that the employer's failure to comply with the provisions of this chapter was willful. (2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

The Secretary of Labor has substantial administrative responsibilities under USERRA, 38 U.S.C. 4331. In 2005, the Department of Labor promulgated regulations implementing the statute, 20 C.F.R. Pt. 1002. Pertinent to employment contracts and agreements, 20 C.F.R. 1007.2(a) states:

> USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

20 C.F.R. 1007.2(d) states:

> If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of

absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

## STATEMENT OF THE CASE

### 1. Factual Background

In July 2007, George Wysocki, an Army Reservist, returned from military service in Afghanistan where he had served since 2006. Pet. App. 35-37. Wysocki promptly reported to his civilian employer, IBM, his employer of twenty-eight years. Pet. App. 26. Wysocki notified IBM that his skills as a database administrator had diminished while away and he would need time to update his knowledge of IBM's programs, software, and technology. *Id.* In the past, as required by USERRA, IBM provided retraining and assistance when Wysocki returned from Operation Joint Forge in 2002, Operation Iraqi Freedom in 2003, and Operation Brightstar in 2005. *Id.* However, this time, IBM refused any training or assistance. IBM terminated Wysocki's employment without cause and in direct violation of USERRA on October 15, 2007 – three months after reemployment. *Id.* As Wysocki's period of military service immediately before reemployment exceeded 180 days, Wysocki was entitled to at least one year of reemployment with IBM pursuant to 38 U.S.C. § 4316(c).

On the date of termination, IBM provided Wysocki with a severance agreement titled "Individual Separation Allowance Plan" (ISAP). The ISAP does not specifically refer to USERRA, but states that Wysocki waives "all claims, demands, actions or liabilities [he] m[ight] have against IBM of whatever kind," and includes within its scope "any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on . . . veteran status. . . ." Pet. App. 48-53. The ISAP also states that acceptance or revocation of the terms of the ISAP "does not alter or change the termination of your employment with IBM." Wysocki signed the ISAP and accepted $6,023.65 as severance compensation. Pet. App. 3-4.

## 2. Procedural History

Wysocki filed suit in federal district court on May 12, 2008 alleging violations of USERRA. The verified complaint states dates of military service and dates of employment with IBM. Pet. App. 35-37. The complaint also alleges discrimination based on military service, termination without cause and denial of reemployment rights and benefits under the Act. Pet. App. 36-37.[1]

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[1] Although suit was originally filed in the Federal District Court for the Western District of Kentucky, Wysocki sought and was granted transfer to the Federal District Court for the Eastern District of Kentucky.

IBM answered and simultaneously filed a Fed.R.Civ.P. 12(b)(6) motion to dismiss and a counterclaim. Pet. App. 39-46. The sole basis for the motion was IBM's contention that the "rights and benefits" referenced in 38 U.S.C. § 4302(b) mean only substantive rights and not procedural rights. IBM narrowly focused on the definition of "rights and benefits" in 38 U.S.C. § 4303(2). According to IBM, the terms of the ISAP prohibited Wysocki from enforcing his USERRA rights in any forum, ever.

The response to the 12(b)(6) motion challenged IBM's interpretation of section 4302(b) and relied on the only published opinion at the time to consider a severance agreement in the context of USERRA, *Perez v. Uline, Inc.*, 157 Cal. App. 4th 953, 68 Cal. Rptr. 3d 872 (Cal. App. 2007). The Court in *Perez* held that the terms of a severance agreement cannot limit or eliminate USERRA rights and benefits given the plain language of 38 U.S.C. § 4302. Wysocki also argued that resolution of the issue was not appropriate under Rule 12(b)(6) because IBM relied on matters outside the pleadings.

Thereafter, IBM filed a reply in support of the Rule 12(b)(6) motion which included an affidavit from Dorothy Morris, a partner in IBM's Human Resources Department. The affidavit confirmed the amount of severance compensation and stated that Wysocki voluntarily executed the ISAP.

The district court, without notice to Wysocki, treated IBM's Rule 12(b)(6) motion as a motion for

summary judgment and relied on matters outside the pleadings. The district court found *Perez* to be "lacking a meaningful analysis on the issue," adopted IBM's argument, and dismissed the complaint. Pet. App. 27-32.

On appeal, the parties made substantially the same arguments as in the district court. A panel of the Sixth Circuit rejected the only argument raised by IBM and adopted by the district court – namely, that a severance agreement may validly eliminate USERRA's procedural rights without implicating the Act's substantive protections. Agreeing with Wysocki, the court held that the terms of the ISAP are subject to section 4302(b):

> [T]he Release purports to preclude Wysocki from advancing a USERRA claim in any forum, ever. An agreement that eliminates all of a veteran's procedural rights also eliminates, for all practical purposes, all of the veteran's substantive rights. Thus, enforcing the Release would provide Wysocki with no opportunity to present and prevail on a USERRA claim. . . .

Pet. App. 12.

The court then, sua sponte, considered whether section 4302(a) barred Wysocki's claims anyway. It found that section 4302(b) "is limited by § 4302(a), which exempts any law, plan or agreement that is 'more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter' from

the operation of § 4302(b)." Pet. App. 12a. Given the language of section 4302(a), the panel held that Wysocki failed to present any evidence to contradict that the severance compensation was subjectively "more beneficial" to him than rights and benefits under USERRA. The panel therefore enforced the terms of IBM's severance agreement. Pet. App. 12-16.

Although section 4302(a) was never raised as an affirmative defense, argued by IBM, or considered by the district court, the concurring opinion similarly observed that Wysocki "did not present any evidence that would suggest that the money that he received for signing the Release was less beneficial than his USERRA rights, and thus inadequate under section 4302(a)." Pet. App. 19. However, the relationship between section 4302(a) and section 4302(b) prompted the concurring judge to comment:

> Section 4302 is an exceedingly strange statute, at least as applied to contractual waivers of rights, in that it bases the validity of an agreement on whether enforcement results in a situation "more beneficial" than the hypothetical scenario that would have existed had the plaintiff litigated rather than waived his USERRA rights. I cannot recall ever having encountered anything remotely similar in my more than thirty years on the bench.

Pet. App. 16.

This Court has not previously interpreted 38 U.S.C. § 4302. Wysocki now petitions for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### CERTIORARI IS WARRANTED TO DETERMINE WHETHER SEVERANCE AGREEMENTS MAY VALIDLY ELIMINATE EMPLOYEE RIGHTS AND BENEFITS UNDER USERRA AND TO RESOLVE CONFLICTING INTERPRETATIONS OF 38 U.S.C. § 4302

#### A. The Relationship Between Severance Agreements And Veterans' Reemployment Rights Laws Presents An Important Question Which Justifies Certiorari

In May 2010, there were 131,066 National Guard and Reservists on active duty and 638,452 had been deactivated since September 11, 2001.[2] According to the Pentagon's report to the Senate Health, Education, Labor and Pensions Committee in November 2007, nearly 11,000 Guardsmen and Reservists were denied prompt reemployment, almost 22,000 lost seniority, some 20,000 saw pension cuts, more than 15,000 did not receive retraining, and close to 11,000

[2] U.S. Department of Defense, "Reserve Component Utilization Status, Noble Eagle/Enduring Freedom/Iraqi Freedom, Unique SSAN Activations as of May 18, 2010," http://ra.defense.gov/documents/Reserve%20Affairs%20Overview.pdf (last visited 7 November 2010).

did not get their health insurance back when they returned to work. These statistics reflect "the growing resistance to hiring or reemploying Reservists or Guardsmen because of the economic pressure it puts on employers."[3]

This case affects all Reservists and Guardsmen who return to civilian employment. It also affects their employers who have a very real economic incentive to avoid federally-mandated reemployment obligations by contract. The relationship between employment agreements and veterans' reemployment rights laws presents an important question that warrants certiorari. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 281 (1946) (whether a collective bargaining agreement may diminish rights under the Selective Training and Service Act " . . . is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.").

The issue is even more important now than when this Court considered *Fishgold*. Today, the military is dependent on the men and women of the National Guard and Reserves for effectiveness.[4] If employers can avoid their reemployment obligations by firing

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[3] Kathryn Piscitelli and Edward Still, *The USERRA Manual: Uniformed Services Employment & Reemployment Rights*, vii (2010 Ed.) (citing the report and collecting statistics).

[4] Michelle Forte, *Reemployment Rights for the Guard and Reserves: Will Civilian Employers Pay the Price for National Defense*, 59 Air Force Law Rev. 287, 294 (2007).

veterans and then contractually bargain away statutory protections, individuals will be less likely to join or continue serving in the National Guard or Reserves. Thus, the question presented implicates, not only a statutorily protected class of workers, but the ability of our nation to effectively defend itself.

The opinion below conflicts with the plain language of 38 U.S.C. § 4302. It also conflicts with other lower court opinions holding that severance agreements and severance compensation do eliminate USERRA's guarantees. This Court should consider the text of USERRA, and specifically section 4302, resolve the conflicting interpretations of the statute, and address the important question presented by this case.

### B. Section 4302 Mandates, Without Exception, That Rights And Benefits Under USERRA Cannot Be Eliminated By Contract Or Agreement

USERRA is a "comprehensive remedial scheme to ensure the employment and reemployment rights of those called upon to serve in the armed forces of the United States." *Morris-Hayes v. Board of Educ. of Chester Union Free School Dist.*, 423 F.3d 153, 160 (2d Cir. 2005). The Act's provisions are to be liberally construed in favor of veterans who leave civilian employment to serve their country when called. *Gordon v. Wawa, Inc.*, 388 F.3d 78, 81 (3d Cir. 2004); *Hill v. Michelin North America, Inc.*, 252 F.2d 307,

313-14 (4th Cir. 2001); *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998); *see also Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (interpreting USERRA's predecessor statute); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (interpreting predecessor statute).

Moreover, USERRA occupies a unique status in employment law. The Act not only protects a class of persons in the workplace but is critical for national security and defense. As the Senate Committee Report on the Veterans' Benefits Improvement Act amending USERRA recognized:

> Because the National Guard and Reserves have become an essential part of the military's operational force, it is imperative that employers comply with USERRA and that the statute be rigorously enforced by the federal government. If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces, especially in the Reserve Forces.

S. Rep. No. 110-449, at 20, 2008 WL 4149915 (Sept. 8, 2008).

USERRA is the most recent in a series of federal veterans' reemployment laws. Congress enacted the first law during World War II. The Selective Training and Service Act (STSA) of 1940 afforded reemployment rights only to draftees. The Service Extension Act of 1941 amended the reemployment provision to include persons who voluntarily enlisted in the armed

forces. Congress expanded the law to afford reemployment rights to persons who left civilian jobs for training or service in the National Guard and Reserves. In 1974, Congress significantly broadened veterans' rights through the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) and later the Veterans Reemployment Rights Act (VRRA). However, the greatest expansion of veterans' reemployment rights came in 1994 with the adoption of USERRA.

In enacting USERRA, Congress sought "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service" and "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(1) and (3). Congress also sought to clarify "overly complex and ambiguous" prior legislation "and where necessary, strengthen the existing veterans' employment and reemployment rights provisions." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304 (4th Cir. 2006) (citation and internal quotations omitted).

The Act provides an unprecedented range of rights and benefits for eligible employees. For example, "[a] person who is a member of . . . a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." 38 U.S.C. § 4311(a). Employers must make reasonable efforts to help

reemployed service persons become qualified for their former position, 38 U.S.C. § 4313, and reemployed service persons must receive the same "seniority and rights and benefits that such person would have attained if the person had remained continuously employed." 38 U.S.C. § 4316(a). USERRA also mandates that benefits, such as employer-sponsored health insurance and pensions, continue during military service and any reemployment period. 38 U.S.C. §§ 4317-4318. Importantly, USERRA requires an employer to reemploy a service person for at least one full year if military service before reemployment is 180 days or more. 38 U.S.C. § 4316(c). The only exception to the one-year reemployment requirement is discharge for cause. *Id.* A service person may seek monetary damages and equitable relief for violations of USERRA. 38 U.S.C. § 4323.

Most importantly, the rights and benefits under USERRA are guaranteed by 38 U.S.C. § 4302. The language in section 4302 – language which did not exist in prior veteran's reemployment rights legislation – states, without limitation, that rights and benefits under USERRA supersede any "contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter. . . ." 38 U.S.C. § 4302(b). Section 4302 also prohibits "the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit" under the Act. *Id.* A contract or agreement may, however, provide rights and benefits which

exceed the USERRA "floor." 38 U.S.C. § 4302(a); 20 C.F.R. 1007.2(a). If an employer provides a contractual benefit which exceeds USERRA's requirements in one area, it may not limit USERRA rights and benefits in another. 20 C.F.R. 1002.7(d). The text of the statute is plain and unambiguous. No court has held otherwise.

The equivalent of section 4302 did not exist in predecessor statutes. Case law filled the gap. In the seminal veterans' reemployment rights case, *Fishgold v. Sullivan Drydock & Repair Corp.*, this Court held that a collective bargaining agreement could not diminish benefits under the STSA given the importance of the Act. 328 U.S. at 286 ("no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act."). Likewise, in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966), this Court found that a severance agreement and severance pay could not diminish benefits under the STSA and rejected the notion that "[t]he Act has no application to any rights created by agreement." *Id.* at 232 (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. at 286; *Oakley v. Louisville N.R. Co.*, 338 U.S. 278, 284 (1949)). However, other cases implied or held that employment agreements could eliminate veterans' reemployment rights so long as the agreements were entered into after the employee returned from military service. *See Leonard v. United Airlines, Inc.*, 972 F.2d 155,

159 (7th Cir. 1992); *Loeb v. Kivo*, 169 F.2d 346, 349 (2d Cir. 1948); *Walsh v. Chicago Bridge & Iron Co.*, 90 F. Supp. 322, 327 (N.D. Ill. 1949); *Niemiec v. Seattle Ranier Baseball Club, Inc.*, 67 F. Supp. 705, 709 (W.D. Wash. 1946); *see also Whitehead v. Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir. 1999) (post-USERRA case enforcing a signed release and waiver of pre-USERRA claims).

Section 4302 makes no distinction between prospective or retrospective provisions in contracts and agreements. Section 4302 "strengthen[ed] the existing veterans employment and reemployment rights provisions" which pre-existed USERRA, *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d at 304 (citation omitted). Moreover, in enacting section 4302, Congress presumably had knowledge of the prospective/retrospective distinction, *cf. Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), but Congress went much further in crafting Section 4302. Because it did, the instructive value typically associated with decisions under prior legislation is of limited utility in the context of contracts or agreements. *See Rogers v. City of San Antonio*, 392 F.3d 758, 762 (5th Cir. 2004); 20 C.F.R. 1002.2 (emphasizing that the large body of case law developed under prior statutes remains in full force and effect "to the extent it is consistent with USERRA.").

USERRA's legislative history, relied upon by the court below, is of dubious value in relation to contracts and agreements. Both the House and Senate

Reports on USERRA envisioned that veterans could waive their individual USERRA rights *by conduct*. *See* H.R. Rep. No. 103-65, pt. 1 at 20, available at 1993 WL 235763 (April 28, 1993) ("The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct."); S. Rep. No. 103-158, at 41, *available at* 1993 WL 432576 (Oct. 18, 1993) ("The rights under chapter 43 belong to the employee and, as such, can only be waived through unambiguous and voluntary action by the employee."). Consistent with the legislative history, USERRA contains specific waiver-by-conduct provisions. *See* 38 U.S.C. § 4316(b)(2)(A) (failure or refusal to give notice or return to reemployment results in waiver); 38 U.S.C. § 4312(a)(2) (USERRA protections do not apply if employee is absent from employment more than five years cumulatively due to military service); *Dowling v. Office of Personnel Management*, 393 F.3d 1260 (Fed. Cir. 2004) (employee waived USERRA protections where he abandoned his civilian career with the Army and began a military career).

However, nothing in the House or Senate Report suggests that an employee may waive USERRA rights *by contract or agreement*. Even if it did, the legislative history cannot usurp the plain and unambiguous terms of section 4302 or USERRA. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385, n. 2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language

according to its natural meaning"); *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) ("We are here to apply the statute, not legislative history, and certainly not the absence of legislative history").

In short, neither pre-USERRA case law regarding contractual waivers nor the legislative history addressing waiver-by-conduct provisions of USERRA inform this case. The plain language of section 4302 controls.

### C. The Decision Below Conflicts With The Plain Text Of Section 4302 And Undermines The Purpose of USERRA

The language of section 4302 is clear and unambiguous: USERRA supersedes "any . . . agreement" without exception. 38 U.S.C. § 4302(b). Only those agreements which incorporate USERRA as a "floor" are enforceable. 38 U.S.C. § 4302(a). Department of Labor Regulations, implemented in 2005, confirm this interpretation. *See* 20 C.F.R. Pt. 1002. Pertinent to employment contracts and agreements, 20 C.F.R. 1007.2(a) states: "USERRA establishes a floor, not a ceiling. . . . [A]n employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA." An employer and employee may not bargain away USERRA for different rights and benefits. This is confirmed by 20 C.F.R. 1007.2(d): "[i]f an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce

or limit other rights or benefits provided by USERRA." Indeed, any such trade-off would violate the very language of Section 4302(b).

The text of section 4302 must be enforced as a whole, according to its terms, and so that no part of the statute is rendered meaningless. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms" (internal quotation marks omitted)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (declining to adopt a "construction of the statute, [that] would render [a term] insignificant"); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be . . . insignificant" (internal quotation marks omitted)).

Neither the district court nor the Sixth Circuit applied these well-settled principles correctly. Indeed, the lower courts' interpretations are at odds, not only with the language of section 4302, but each other.

The district court found that IBM's severance agreement does not implicate section 4302 at all. The "rights and benefits" in section 4302, according to the court, are cabined by section 4303(2)'s definition of "rights and benefits." The district court found that section 4303(2) does not specifically include USERRA's enforcement provisions, so a severance agreement may validly eliminate them. Pet. App. 27-31. The

district court also relied on cases which allowed resolution of USERRA claims via arbitration agreements. *See Landis v. Pinnacle Eye Care, LCC*, 537 F.3d 559, 562 (6th Cir. 2008); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 677 (5th Cir. 2006).

However, the district court ignored the plain language of section 4302(b) which protects "any right or benefit *provided by this chapter.*" (Emphasis added). Chapter 43 includes both substantive and procedural rights, including the right to file suit and seek damages or equitable relief. *See* 38 U.S.C. § 4323. The Sixth Circuit correctly distinguished the arbitration cases cited by the district court as well. Pet. App. 10-12. Both *Landis* and *Garrett* allowed arbitration to harmonize the provisions of USERRA and the Federal Arbitration Act. In any event, both *Landis* and *Garrett* permitted a forum for resolution of USERRA claims, albeit an arbitral one. As the Sixth Circuit recognized, unlike an arbitration agreement, "[a]n agreement that eliminates all of a veteran's procedural rights also eliminates, for all practical purposes, all of the veteran's substantive rights." Pet. App. 12.

Unfortunately, the Sixth Circuit displaced the district court's flawed reasoning with its own. The court chose to narrowly focus on the language of section 4302(a). Section 4302(a) recognizes that agreements, although superseded by USERRA, are valid if "more beneficial" to the employee than rights and benefits afforded by USERRA. Pet. App. 14 ("[T]he Release is exempted from the operation of

§ 4302(b) by § 4302(a)."). The court assumed that severance agreements are "more beneficial" to terminated employees than USERRA's protections. Accordingly, the court placed the burden on the terminated employee to prove otherwise. Because Wysocki did not come forward with this required but unspecified proof, the court affirmed dismissal. Pet. App. 14-15.

The Sixth Circuit's opinion enforces Section 4302(a) at the expense of section 4302(b). In doing so, it substantially dilutes, if not wholly eliminates, section 4302(b)'s protections. The majority and concurring opinions also create "additional prerequisites to the exercise of any such right or the receipt of any such benefit" in violation of section 4302(b). The opinions place the onus on the employee who, presumably, must seek rescission of the severance agreement first, and then present extra-contractual proof that a severance agreement is "less beneficial" than rights and benefits under USERRA second. The concurring opinion is quite blunt on this last point:

> And more to the point, [Wysocki] did not present any evidence that would suggest that the money that he received for signing the Release was less beneficial than his USERRA rights, and thus inadequate under section 4302(a). An affidavit likely would have sufficed to create a question of fact that would have required the district court, and ultimately this Court, to determine what it means for one thing to be "more beneficial"

> than something else. Because Wysocki presented no such evidence, I agree with the majority that the proper conclusion on this record is that the Release resulted in a situation more beneficial to Wysocki than his USERRA.

Pet. App. 19.[5] Nothing in the text of USERRA mandates these preconditions. Therefore, section 4302(b) prohibits them.

The Sixth Circuit's interpretation of Section 4302 is anything but a liberal construction in favor of the employee. *See Gordon v. Wawa, Inc.*, 388 F.3d at 81; *Hill v. Michelin North America,* Inc., 252 F.2d at 313-14; *McGuire v. United Parcel Serv.*, 152 F.3d at 676. The notion that it can be "more beneficial" for an employee to be fired with severance compensation rather than receive USERRA protection is an odd one to say the least. The idea that USERRA requires the employee to prove otherwise is wholly unsupported by the Act itself. In any event, the court's reasoning does not construe the Act in favor of employees.

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[5] Both the majority and concurring opinion ignore the fact that Section 4302(a) was not raised as an affirmative defense, argued by IBM, or considered in the district court. Presumably, Wysocki should have anticipated the argument anyway and then submitted proof in opposition. Wysocki filed a petition for rehearing for this reason. The court denied the petition. Pet. App. 33.

Finally, the Sixth Circuit's interpretation defeats the purpose of the Act. The opinion invites astute employers to simply include the "more beneficial" language in their standard severance agreements. If the employee agrees that severance compensation is "more beneficial" than USERRA rights and benefits, the agreement would presumably defeat section 4302(b). Most importantly, the opinion creates undesirable incentives for employers. If employers can avoid reemployment obligations, they will. Reemployment is costly. Businesses that adopt a strategy to minimize reemployment obligations have a comparative advantage over those who do not. The Sixth Circuit's opinion provides a cost-saving blueprint: fire the veteran first and then negotiate a favorable bargain with the financially-strapped former employee. But the long-term consequences of the strategy are more costly than the savings to business. Those who would serve our country in the National Guard and Reserves will be less inclined to do so if they know their civilian employment is at risk. Such a result, if allowed to stand, will have serious consequences for our nation's all-voluntary military as well as national defense.

### D. The Decision Below Conflicts With Lower Court Opinions Addressing USERRA And Severance Agreements

Prior to the Sixth Circuit's decision, other courts had no trouble applying the plain language of USERRA under similar facts. *See Perez v. Uline, Inc.*, 157 Cal. App. 4th 953, 68 Cal. Rptr. 3d 872 (Cal. App. 2007); *Bursese v. Paypal, Inc.*, 2007 WL 485984 (N.D. Cal. 2007).

In *Perez*, the California Appeals Court held that a severance agreement executed by an employee did not effectively release USERRA claims. Perez filed various claims against his employer, Uline, Inc. after he was terminated the day after he returned to work from active duty with the United States Marine Corps Reserves. In exchange for severance pay, Perez executed a Severance Agreement and Release which purported to release "any and all claims" against Uline, including USERRA claims. The trial court concluded that the release barred Perez's claims and dismissed the lawsuit. On appeal, the Fourth District Court of Appeal held that USERRA "plainly states that a contract may not limit the protections of USERRA, which prohibits termination of employment based on membership in the military or performance of military service." *Perez*, 68 Cal. Rptr. 3d at 875. The Court therefore reinstated Perez's USERRA claims.

In *Bursese,* the employee filed suit for constructive discharge and violations of USERRA. The employer, Paypal, moved for summary judgment because it had paid the employee severance compensation during the statutory period of reemployment required by 38 U.S.C. § 4316. Paypal argued that the payment of severance compensation was the same as reemployment under USERRA. The district court denied summary judgment. The Court found no authority for the argument that severance compensation is the equivalent of employment for the purposes of 38 U.S.C. § 4316.

Unlike the decision below, both *Perez* and *Bursese* properly apply the plain and unmistakable language of USERRA. Moreover, as a testament to the plain language of section 4302, *Perez* is the only other appellate opinion in the sixteen-year history of USERRA to address the question presented by this case. Now, in light of the Sixth Circuit's opinion, employers will seek to enforce severance agreements despite the language of section 4302. At least one district court has followed the Sixth Circuit's lead and held that severance agreements do not supersede USERRA. *See Baldwin v. City of Greensboro*, 2010 U.S. Dist. LEXIS 82278 (M.D.N.C. 2010) (also citing *Jolley v. Dep't of Hous. & Urban Dev.*, 299 Fed. Appx. 966 (Fed. Cir. 2008) (involving court-approved settlement of USERRA claim)).

This case presents an excellent vehicle for the Court to resolve the conflicting authority, provide

guidance to the lower courts, and address the critical question presented.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 11, 2010

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

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GEORGE WYSOCKI,

*Plaintiff-Appellant,*

*v.*

INTERNATIONAL BUSINESS MACHINE CORPORATION, dba IBM, Inc.,

*Defendant-Appellee.*

No. 09-5161

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 08-00464 – Karl S. Forester, District Judge.

Argued: October 9, 2009

Decided and Filed: June 16, 2010

Before: MARTIN, GUY, and McKEAGUE, Circuit Judges.

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## COUNSEL

**ARGUED:** Kevin C. Burke, LAW OFFICE, Louisville, Kentucky, for Appellant. Richard G. Griffith, STOLL KEENON OGDEN PLLC, Lexington, Kentucky, for Appellee. **ON BRIEF:** Kevin C. Burke, LAW OFFICE, Louisville, Kentucky, Lawrence I. Young, ROMINES, WEIS & YOUNG, P.S.C., Louisville, Kentucky, for Appellant. Richard G. Griffith, Elizabeth S. Muyskens, STOLL KEENON OGDEN PLLC, Lexington, Kentucky, for Appellee.

McKEAGUE, J., delivered the opinion of the court, in which GUY, J., joined. MARTIN, J. (pp. 11-13), delivered a separate concurring opinion.

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## OPINION

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McKEAGUE, Circuit Judge. Plaintiff-Appellant George Wysocki alleges that defendant-appellee International Business Machines ("IBM") refused to properly reintegrate Wysocki as a data administrator after he returned from military service in Afghanistan, in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Before he was terminated, Wysocki signed a general release (the "Release") as part of an Individual Separation Allowance Plan he negotiated with IBM. In return, Wysocki received over $6,000. After signing the Release, Wysocki filed suit against IBM for violating his USERRA rights and IBM filed a motion to dismiss. The district court converted IBM's motion to dismiss into a motion for summary judgment and granted it, after determining that Wysocki voluntarily and knowingly released any claims against IBM.

On appeal, Wysocki argues that the district court abused its discretion when it converted his motion to dismiss into a motion for summary judgment and that 38 U.S.C. § 4302(b) of USERRA supercedes the Release. We affirm the district court's decision.

## I. Background

In July 2007, Wysocki returned from military service in Afghanistan and reported back to IBM. Immediately prior to his military service, Wysocki had worked as an IBM database administrator. When he returned, Wysocki notified his supervisor that his skills had diminished while on military service, and that he would need time to update his knowledge of IBM's programs, software, and technology. When he had previously returned from military service, IBM had provided shadowing and assistance from other employees which allowed Wysocki to reintegrate; however, this time, IBM refused any training or assistance. Wysocki alleges that IBM's refusal to assist him in reintegrating violated his USERRA rights and that, despite IBM's knowledge and understanding of USERRA, that IBM terminated Wysocki's employment without cause and in direct violation of USERRA on October 15, 2007.

On the same day that his employment with IBM was terminated, Wysocki signed the Release as part of an Individual Separation Allowance Plan he negotiated with IBM. The language of the Release is broad and, although it did not specifically refer to USERRA by name, it states that Wysocki waives "all claims, demands, actions or liabilities [he] m[ight] have against IBM of whatever kind," and includes within its scope "any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on . . . veteran status. . . ." (R. 15, Countercl. ¶ 5; R. 14, Ex. A-Release.)

The Release gave Wysocki a twenty-one day period to consider it before signing, and a seven day period after signing to revoke his acceptance. Wysocki received $6,023.65 as a gross severance payment for signing the Release. The Release specifically instructed Wysocki to consult with an attorney before signing, and this instruction was displayed prominently in capital letters and underlined at the top of the Release. Wysocki accepted the severance payment, did not exercise his right to revoke his acceptance, and he has not tendered the severance payment to IBM.

Wysocki filed a complaint on May 12, 2008 alleging that IBM discriminated against him in violation of USERRA. On September 3, 2008 IBM answered Wysocki and simultaneously filed a Rule 12(b)(6) motion to dismiss and a counterclaim. Wysocki filed his response to IBM's motion to dismiss on October 10, 2008. On November 6, 2008 IBM filed a reply in support of its 12(b)(6) motion which included an affidavit from Dorothy Morris, a partner in IBM's Human Resources Department. This affidavit stated that Wysocki "voluntarily executed the Release . . . [and] was given adequate time to read the document and review the terms and conditions that it contained." (R. 24, Reply – Morris Aff. ¶ 2.)

Wysocki originally filed the case in the Western District of Kentucky, but sought and was granted transfer to the Eastern District of Kentucky. The order transferring the case to the Eastern District of Kentucky issued on November 12, 2008. On January

26, 2009 District Judge Forester upheld the Release and granted summary judgment to IBM. The district court treated IBM's motion to dismiss as a motion for summary judgment and relied on matters outside the pleadings.

Wysocki appeals both the district court's decision to convert the motion to dismiss into a motion for summary judgment and its determination that 38 U.S.C. § 4302(b) of USERRA did not supercede the Release.

## II. The Motion for Summary Judgment

IBM submitted, and the district court considered, matters outside the pleadings; consequently, the district court converted the motion to dismiss into a motion for summary judgment. The federal rules require that if, in a 12(b)(6) motion to dismiss, "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." FED. R. CIV. P. 12(d). We review the district court's decision to convert a 12(b)(6) motion to dismiss into a motion for summary judgment for abuse of discretion. *See Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 203 (6th Cir. 1998). A decision will be reversed for abuse of discretion only if we have "a definite and firm conviction that the trial court committed a clear error of judgment." *Barnes v. Owens-Corning Fiberglas Corp.*,

201 F.3d 815, 820 (6th Cir. 2000) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989)). Where "one party is likely to be surprised by the proceedings, notice is required," but generally, "[w]hether notice of conversion of a motion to dismiss to one for summary judgment by the court to the opposing party is necessary depends upon the facts and circumstances of each case." *Salehpour*, 159 F.3d at 204; *see also Shelby County Health Care Corp. v. Southern Council of Indus. Workers Health & Welfare Trust Fund*, 203 F.3d 926, 931 (6th Cir. 2000).

We find that it was not an abuse of discretion for the district court to determine that Wysocki had notice that the motion to dismiss might be converted into a motion for summary judgment and that he had a reasonable opportunity to present materials outside the pleadings. Defendant IBM filed its motion to dismiss on September 3, 2008 and attached a copy of the Release, a document outside the pleadings which, if the district court considered it, would require the district court to covert [sic] the motion to dismiss into a motion for summary judgment. IBM specifically mentioned in the memorandum supporting its motion that: "On a motion to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleadings may be presented and considered by the Court. . . . If the court considers such matters, the motion to dismiss should be treated as one for summary judgment under Rule 56." (R. 14, Mem. at 3) (citation omitted). Thus, IBM's motion to dismiss both introduced the actual Release and

informed Wysocki that the motion to dismiss could be converted into a motion for summary judgment.

Wysocki filed his response to IBM's motion to dismiss on October 10, 2008. In it he discussed case law explaining that, as a general proposition, the non-moving party should receive notice and an opportunity to supplement the record before a district court converted a 12(b)(6) motion into a motion for summary judgment. Wysocki did not, however, even attempt to apply this case law to his situation. He did not state that he needed any additional discovery or an opportunity to supplement the record, and his response clearly indicated that Wysocki understood that the court might grant summary judgment. On November 6, 2008 IBM filed a reply in support of its 12(b)(6) motion which included an affidavit from Dorothy Morris, a partner in IBM's Human Resources Department. Morris's affidavit constituted additional material clearly outside the pleadings which, if considered by the district court, also required the district court to convert the motion to dismiss into one for summary judgment.

The language in IBM's initial memorandum and the fact that it included the Release in its motion to dismiss and attached Morris's affidavit to its reply, put Wysocki on notice that the court might consider items outside the pleadings. The district court construed the motion to dismiss as a motion for summary judgment and ruled on January 26, 2009. Wysocki had nearly five months after IBM filed its initial motion to dismiss, and nearly three months

after IBM filed its reply, to request discovery or to file an affidavit or additional materials supporting a denial of summary judgment.[1] Under the facts presented here, the district court's decision to convert the motion to dismiss into one for summary judgment was not an abuse of discretion.

## III. The USERRA Claim

We review the district court's grant of summary judgment de novo. *Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006). Whether Wysocki could waive his USERRA claim through the Release is a matter of statutory interpretation, and depends on the meaning of 38 U.S.C. § 4302. In matters of statutory interpretation, we look first to the text and, if the meaning of the language is plain, then "the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540

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[1] Indeed, Wysocki notes on appeal that the district court had no evidence of his "military experience and length of service with IBM," or of his "salary or benefits to gauge sufficiency of consideration," or of "any facts and circumstances preceding the execution of the [Release] either." (Appellant Br. 12-13). However, at no point has he actually presented any factual information that the Release was not signed knowingly or voluntarily. More importantly, this missing information appears to fall entirely within Wysocki's personal knowledge, and could have been supplied by him via affidavit without any need for discovery after he became aware that the court might consider matters outside the pleadings.

U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (citation omitted); *see also Thompson v. North American Stainless, L.P.*, 567 F.3d 804, 806 (6th Cir.2009).

USERRA has a specific provision, 38 U.S.C. § 4302, dealing with its relation to other laws, plans, and agreements.[2] Section 4302 establishes that:

> (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
>
> (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

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[2] We note that the only issue we are deciding is whether Wysocki could waive, through a release he personally agreed to, USERRA rights that had already matured. We are not deciding, for instance, whether an agreement that eliminated a veteran's USERRA rights as a condition of initial employment or through a collective bargaining agreement would be valid.

38 U.S.C. § 4302. Wysocki argues that the Release is a contract or agreement that eliminates his rights and benefits under USERRA and, therefore, that it is automatically superseded by the language of § 4302(b).

**A.**

Initially, we note that the rights and benefits protected in § 4302 are defined in 38 U.S.C. § 4303(2):

> (2) The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

The rights and benefits listed in § 4303(2) are all substantive rights. They do not deal with the procedure or process for enforcing those rights and benefits. Arguably, applying the definition in § 4303(2) to § 4302, the only "rights" and "benefits" protected in § 4302 are substantive, not procedural, rights; therefore, § 4302(b) does not prevent veterans from waiving their procedural rights because it does not apply

to a waiver of a veteran's procedural rights. Under this reading, since the Release waived all of Wysocki's procedural and substantive rights, and since the waiver of all of Wysocki's procedural rights, which is not affected by § 4302, would prevent this suit, summary judgment for IBM would be appropriate.

The district court followed this reasoning, and IBM urges it upon us. Moreover, this conclusion is supported to some degree by prior case law in this circuit, which recognized, along with other circuits, the distinction between procedural and substantive rights for the purposes of § 4302. In particular, in *Landis v. Pinnacle Eye Care, LLC*, we enforced a contract providing for the arbitration of a veteran's USERRA claim. 537 F.3d 559, 562 (6th Cir. 2008). *Landis* based its reasoning on *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006), which discussed the definition of rights and benefits provided in § 4303(2), as it applies to § 4302(b), and recognized the distinction between procedural and substantive rights. *Landis,* 537 F.3d at 562 (discussing *Garrett,* 449 F.3d 672, 674-80).

Wysocki distinguished this case in part from *Landis* by noting that this case involves a "wholesale contractual elimination of all methods to enforce USERRA's rights and benefits." (Appellant Reply Br. 8). We agree. We enforced the arbitration provision at issue in *Landis* because arbitration still "presents a fair opportunity for a claimant to present and prevail on a claim of a USERRA violation." 537 F.3d at 563. This is so because "[b]y agreeing to arbitration, a

party does not forego the substantive rights provided by the statute, but rather it submits its claims to an arbitral forum instead of a judicial forum." *Id.* at 562. Here, however, the Release purports to preclude Wysocki from advancing a USERRA claim in any forum, ever. An agreement that eliminates all of a veteran's procedural rights also eliminates, for all practical purposes, all of the veteran's substantive rights. Thus, enforcing the Release would provide Wysocki with no opportunity to present and prevail on a USERRA claim, much less the "fair opportunity" required by *Landis*. The agreements at issue in *Garrett* and *Landis* were found not to implicate § 4302 because they did not extend to substantive rights and still allowed for a "fair opportunity" to advance those rights. Here, however, the Release squarely implicates § 4302.

**B.**

However, the fact that § 4302 applies to the Release, does not mean that the Release is automatically superceded by § 4302. While § 4302(b) supercedes any law, plan or agreement that "reduces, limits, or eliminates in any manner any right or benefit provided by this chapter," its application is limited by § 4302(a), which exempts any law, plan or agreement that is "more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter" from the operation of § 4302(b). Therefore, the critical inquiry is whether the Release is exempted from the operation of § 4302(b) by

§ 4302(a), because the rights it provided to Wysocki were more beneficial then [sic] the rights that he waived.

In determining whether the rights Wysocki received in exchange for signing the Release were more beneficial than the rights he gave up, we are cognizant of the fact that other courts have recognized that USERRA's provisions are to be liberally construed in favor of veterans. *See Gordon v. Wawa, Inc.*, 388 F.3d 78, 81 (3d Cir. 2004) ("[W]e construe USERRA's provisions liberally, in favor of the service member."); *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998) ("USERRA is to be liberally construed in favor of those who served their country."); *see also Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (stating that USERRA's predecessor "is to be liberally construed for the benefit of the returning veteran"). We also note that the legislative history clearly envisioned that veterans would be able to waive their individual USERRA rights by clear and unambiguous action. *See* H.R. Rep. No. 103-65, at 20 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2453 ("The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct."); S. Rep. 103-158, at 41, *available at* 1993 WL 432576 (Oct. 18 1993) ("The rights under chapter 43 belong to the employee and, as such, can only be waived through unambiguous and voluntary action by the employee."); *see also* WILLISTON ON CONTRACTS § 73:7 (4th ed.) ("[B]ecause releases are in the nature of settlements, the strong public policy in

favor of encouraging the resolution of disputes is also implicated, and courts will interpret releases to further that policy."), 66 AM.JUR.2D *Release* § 2. Clearly, the ability to waive their USERRA rights without unnecessary court interference, if they believe that the consideration they will receive for waiving those rights is more beneficial than pursuing their rights through the courts, is both valuable and beneficial to veterans.

In this case, the Release used clear and unambiguous language and involved a valuable amount of consideration. The Release stated that it covered claims based on "veteran status." This clear and unambiguous language informed Wysocki that he was waiving his USERRA rights and, in exchange for signing the Release, Wysocki received over $6,000. Under these circumstances, it appears from the record that Wysocki understood that the Release eliminated his USERRA rights, that he signed the Release because he believed that the rights provided in the Release were more beneficial than his USERRA rights and, therefore, that the Release is exempted from the operation of § 4302(b) by § 4302(a). Wysocki has not presented any argument or evidence to the contrary, nor do we find any such evidence in the record. Furthermore, there is no evidence of mistake, incapacity, fraud, misrepresentation, unconscionability, or duress. We also note that Wysocki was encouraged to see a lawyer and had ample time to consider the Release before he signed

it.[3] In short, we hold that § 4302 does not invalidate the Release.

## IV. Conclusion

As Wysocki had notice that the district court might convert IBM's motion to dismiss into a motion for summary judgment, and had a reasonable opportunity to present additional material and to request discovery, we find that the district court did not abuse its discretion in converting the motion to dismiss into a motion for summary judgment. Furthermore, we find that the Release is valid because, while we find that 38 U.S.C. § 4302 applies to a waiver of all procedural rights, § 4302 does not prevent Wysocki from

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[3] Generally, release is an affirmative defense that must be pled by the defendant, which includes showing that the release was fairly executed and fairly represented the amount to which the claimant was entitled. *See generally* 5 KY. PRAC. METHODS OF PRAC. § 41:14 (4th ed. 2009); 66 AM.JUR.2D *Release* §§ 40-41; 76 C.J.S. *Release* § 84 ("The burden of establishing a release is on the party relying on it, but, where a release . . . is established, the opposing party has the burden of proving facts rendering the release void."). Here, IBM specifically pled release as an affirmative defense, and provided a copy of the Release and an affidavit attesting to the fact that Wysocki voluntarily signed the Release. After the affirmative defense of release is asserted, the plaintiff may show the invalidity of the release, which can be done by showing mistake, incapacity, fraud, misrepresentation, unconscionability, or duress. *See generally* 5 KY. PRAC. METHODS OF PRAC. §§ 41:4-6; WILLISTON ON CONTRACTS § 73:14 (4th ed.).

releasing his USERRA rights. As a result, we **AFFIRM** the district court's decision.

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## CONCURRENCE

BOYCE F. MARTIN, JR., Circuit Judge, concurring. This case presents a question of first impression in the federal courts – the construction and application of 38 U.S.C. § 4302. Section 4302 is an exceedingly strange statute, at least as applied to contractual waivers of rights, in that it bases the validity of an agreement on whether enforcement results in a situation "more beneficial" than the hypothetical scenario that would have existed had the plaintiff litigated rather than waived his USERRA rights. I cannot recall ever having encountered anything remotely similar in my more than thirty years on the bench. When confronted with a case in the right posture – a plaintiff placing the waiver squarely at issue with factual support and seeking rescission under section 4302 – section 4302 raises fascinating questions about what it means for one thing to be "more beneficial" than something else and how courts are to make that determination.

But the case is not before us in the right posture. Wysocki brought a USERRA claim without mentioning the Release. Then, when IBM asserted the

Release as an affirmative defense, Wysocki argued the law – that section 4302 somehow automatically invalidates the Release – instead of coming forward with evidence to create a dispute over whether the Release resulted in a situation more beneficial than his USERRA rights. This case is, therefore, not the right vehicle for broad statements about the application of section 4302. I applaud the majority's exercise of restraint in deciding this case narrowly instead of permitting these bad facts to result in bad law.

I concur without reservation in Part II because IBM's pleadings and the Federal Rules of Civil Procedure put Wysocki on notice that IBM's motion could be decided under Rule 56. However, Wysocki did nothing to supplement the record with evidence or an affidavit that would create a fact question on the key issue regarding the Release – whether the consideration received in return for executing the Release was more beneficial than his rights under USERRA. I also concur without reservation in Part III.A. The effect of the Release is to eliminate all of Wysocki's procedural rights to enforce the protections of USERRA, in addition to eliminating those substantive protections as well. This complete elimination of procedural options clearly deprives Wysocki of the "fair opportunity" to enforce his USERRA rights required by *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 563 (6th Cir. 2008). Thus, the Release implicates 38 U.S.C. § 4302. It remains for future courts to determine what level of elimination of discreet procedural

options, short of wholesale elimination, fails the "fair opportunity" test.

That leaves part III.B, discussing whether section 4302 renders the Release unenforceable. I concur in Part III.B *as I interpret it,* so I will explain my understanding of the majority's analysis. The critical inquiry under section 4302 is whether the waiver of USERRA rights results in a situation more beneficial to the veteran than if the veteran had asserted his USERRA rights. I completely agree with the majority that both the text and legislative history of section 4302 indicate that a veteran should be able to waive his rights, *so long as* the waiver passes the test created by section 4302. Furthermore, I do not read section 4302 to affect the law's general preference for enforcing contractual waivers of rights, as noted by the majority, *ante* at 9. Stated differently, though section 4302 drastically alters the test for determining the enforceability of a waiver, it does not change the general sentiment that courts should not hesitate to enforce legally compliant waivers.

The majority properly focuses on three facts in determining that the Release passes section 4302 muster. First, the Release unambiguously seeks to waive all of Wysocki's USERRA rights, or in the Release's words, his rights based on "veteran status." Second, Wysocki received substantial consideration in return for executing the Release. What I want to make clear is that these two facts, standing alone, are not sufficient to find that the Release satisfies section 4302. Just because (1) a waiver clearly declares an

intent to waive USERRA rights and (2) the veteran received substantial consideration does not permit the inference that the consideration was more beneficial to the veteran than his USERRA rights. Stated differently, the face of the Release does not allow for a conclusion of enforceability. At the most, it satisfied IBM's initial burden of production in asserting the Release. The burden then shifted to Wysocki to come forward with evidence calling into question the Release's satisfaction of section 4302. This brings us to the third, and most critical, fact in this case.

In addition to producing the Release, IBM presented evidence that Wysocki signed the Release knowingly, voluntarily, and not under duress. In response, Wysocki presented nothing but an incorrect legal argument that section 4302 invalidated the Release as a matter of law. He presented no evidence indicating that he was under duress or did not knowingly waive his USERRA rights. And more to the point, he did not present any evidence that would suggest that the money that he received for signing the Release was less beneficial than his USERRA rights, and thus inadequate under section 4302(a). An affidavit likely would have sufficed to create a question of fact that would have required the district court, and ultimately this Court, to determine what it means for one thing to be "more beneficial" than something else. Because Wysocki presented no such evidence, I agree with the majority that the proper conclusion on this record is that the Release resulted in a situation more beneficial to Wysocki than his

USERRA rights and was thus enforceable under section 4302(b). Understanding the majority's analysis in this way, I concur.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

CIVIL ACTION NO. 08-464-KSF

GEORGE WYSOCKI PLAINTIFF

v. **OPINION & ORDER**

INTERNATIONAL BUSINESS MACHINES CORPORATION DEFENDANT

* * *

Currently before the Court is the motion of the defendant, International Business Machines Corporation ("IBM"), to dismiss the plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This matter is fully briefed and is ripe for review.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The facts, as alleged by the plaintiff, George Wysocki, are as follows. Wysocki was employed by IBM from 1979 until his termination on October 15, 2007. During this time, Wysocki was also a member of the United States Armed Forces, namely the Department of the Army, and he was deployed to active duty for service in Operation Joint Forge, Bosnia (2001-2002), Operation Iraqi Freedom, Kuwait/Afghanistan/Iraq (2003), Operation Brightstar, Egypt (2005), and Operation Enduring Freedom, Afghanistan (2006-2007). Wysocki alleges that he provided

IBM with documentation and notice of his deployment to active military service for each and every deployment. He further alleges that the notice was received and acknowledged by IBM.

When Wysocki returned from Operation Enduring Freedom and his tour of duty in Afghanistan in 2007 under honorable conditions, he contends that he reported to IBM in a timely manner. However, Wysocki contends that he was advised that IBM would not provide or permit any additional training or assistance to him in an effort to reintegrate him into his position as a Database Administrator. Wysocki alleges that he notified his supervisor that his skills had diminished without constant use during his deployment, and that he needed time to learn changes in programs, software, and technology. According to Wysocki, on previous occasions IBM would permit shadowing or assistance from other employees in an effort to allow returning servicemen the ability to sharpen their skills.

IBM ultimately terminated Wysocki's employment on October 15, 2007. Wysocki contends that the termination of his employment violates the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq.*, and that IBM has discriminated against him in favor of employees that had not been called into military service. On May 12, 2008, Wyscoki [sic] filed his

complaint pursuant to the USERRA with this Court.[1] He seeks compensatory and punitive damages. Currently pending is IBM's motion to dismiss Wysocki's complaint on the grounds that he executed a binding release as a part of a severance package he negotiated with IBM at the time of his termination which waives any claims he may have under the USERRA.

## II. IBM'S MOTION TO DISMISS

In support of its motion to dismiss, IBM relies on a General Release (the "Release") executed by Wysocki on October 15, 2007, which contains a full release "from all claims, demands, actions or liabilities you may have against IBM of whatever kind, including, but not limited to, those that are related to your employment with IBM, the termination of that employment . . . or claims for attorneys' fees." [DE #14-3]. Although the Release does not specifically refer to the USERRA, IBM points to the comprehensive description of the wide variety of claims that the Release covers:

> You also agree that this Release covers, but is not limited to, claims arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act

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[1] Although Wysocki originally filed this action with the United Sates [sic] District Court for the Western District of Kentucky, it was transferred to this Court on November 12, 2008 [DE #25].

> of 1964, as amended, the Workers Adjustment and Retraining Notification Act, and any other federal, state, or local law dealing with discrimination in employment including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status, or age, and claims for your attorneys' fees. You also agree that this Release includes, but is not limited to, claims based on theories of contract or tort, whether based on common law or otherwise. In addition you agree to waive any right you have to pursue any claim or grievance through any IBM internal channel including, but not limited to, the IBM Open Door Policy. This Release covers both claims that you know about and those that you may not know about which have accrued by the time you execute this Release.

[DE #14-2]. The Release further provides the specific acknowledgment that "[t]he payment and benefits provided pursuant to the Individual Separation Allowance Plan constitute consideration for this Release, in that they are payments and benefits to which you would not have been entitled had you not signed this Release. Upon executing the Release, Wyscoki received a gross severance payment from IBM in the amount of $6,023.65 [DE #24-2].

IBM also notes that the Release states prominently, just under its title, as follows: "*YOU ARE ADVISED TO CONSULT AN ATTORNEY BEFORE YOU SIGN THIS RELEASE.*" The Release allows a

period of twenty-one days in which to consider the Release and a period of seven days to revoke acceptance even after signing. IBM contends that the Release is relatively brief and is written in plain English that is easily understandable for someone of Wysocki's age and experience. The Release is signed by Wysocki and Corey Allen – designated as an "IBM Witness" – on the final page, along with the handwritten date of execution, 10/15/07 [DE #14-2].

Based on this Release, IBM contends that Wysocki has waived any claim against IBM under the USERRA. Wysocki, on the other hand, argues that there has been no discovery in this matter and that IBM has failed to meet its burden of proof for any affirmative defense. Wysocki further argues that based on 38 U.S.C. § 4302(b), the USERRA supersedes any laws, plans, or agreements which "reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any right or the receipt of any such benefit." 38 U.S.C. § 4302(b).

## III. ANALYSIS

### A. STANDARD GOVERNING A MOTION TO DISMISS

IBM moves the Court to dismiss Wysocki's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, in this case IBM has submitted, and the Court will consider, matters

outside the pleadings; therefore, IBM's motion to dismiss will be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden,* 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.,* 8 F.3d 335, 340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343.

"The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

### B. WYSOCKI'S RELEASE OF HIS USERRA CLAIMS IS ENFORCEABLE AS A MATTER OF LAW

Wysocki has filed this action under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, *et seq.* Congress enacted the USERRA in 1994, replacing the Veterans' Reemployment Rights Act, to clarify, simplify, and strengthen the existing veterans' employment and reemployment rights provisions. Generally, the USERRA prohibits discrimination or acts of reprisal against an employee or prospective employee because of military obligations. The act is broadly construed in favor of its miliary [sic] beneficiaries. *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (interpreting USERRA's predecessor).

The first issue the Court must resolve is whether or not a retrospective waiver of statutory claims is permissible under the USERRA. The Sixth Circuit has not yet addressed this issue. The relevant portion of the USERRA provides as follows:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 4302(b). Wysocki contends that the statute renders the Release he executed in favor of IBM ineffective because the right to bring a suit for damages is among the "rights and benefits" guaranteed by the USERRA. He relies on *Perez v. Uline, Inc.*, 157 Cal.App.4th 953, 68 Cal.Rptr.3d 872 (Cal. Ct. App. 2007), a recent decision from the California Court of Appeals, which held that § 4302(b) prohibits the enforcement of an employee release agreement waiving claims under the USERRA.

This Court is not bound by the California appellate court's decision. The decision is lacking a meaningful analysis of the issue, and has no precedential value in this Court. Certainly, the USERRA prohibits laws or agreements which reduce, limit, or eliminates any "right" or "benefit." 38 U.S.C. § 4302(b). The rights and benefits protected by the USERRA include the right to reemployment and leave of absences, protection from discrimination, retention of employment benefits, and other *substantive* rights. The statute, however, does not preclude an agreement eliminating any of the *procedures* used to enforce

those substantive rights. *See Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006) (holding arbitration of USERRA claims not barred by § 4302(b); *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008) (relying on *Garrett* in holding that USERRA claims may be resolved through arbitration); *Aull v. McKeon-Grano Associates, Inc.*, 2007 WL 655484 (D.N.J. February 26, 2007) (holding that a contract between an employer and employee that sets forth a shorter statute of limitations than that provided under federal law is enforceable under USERRA); *Dettling v. Adams*, 575 F.Supp.2d 842 (N.D.Ohio 2008) (holding that the USERRA only protects members' substantive rights – those rights that relate to compensation and working conditions, not to affording a particular forum for dispute resolution).

Additionally, a review of the USERRA itself supports this conclusion. The various substantive rights protected by the USERRA are contained in the portion of the act entitled "Employment and Reemployment Rights and Limitations; Prohibitions," 38 U.S.C. §§ 4311-4319, while the procedural requirements and vehicles for enforcing those rights are contained in the portion of the act entitled "Procedures for Assistance, Enforcement, and Investigation," 38 U.S.C. §§ 4321-4327. Accordingly, the Court holds that nothing in the USERRA prohibits an agreement to reduce or eliminate the procedures used to enforce the substantive rights guaranteed under the USERRA. Therefore, Wysocki's waiver of claims

in the Release extends to any claims under the USERRA.

### C. THE GENERAL RELEASE EXECUTED BY WYSOCKI IS VALID

Even if the Release is enforceable as a matter of law, Wysocki contends that IBM has failed to satisfy its burden of proof and that further discovery is necessary. However, the evidence before the Court is sufficient to find that Wysocki and IBM knowingly and voluntarily negotiated and executed a valid release of his USERRA claims. When evaluating whether a release has been knowingly and voluntarily executed, courts look to the following factors: (1) the plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; and (5) the totality of the circumstances. *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995).

The plaintiff, a war veteran and database administrator, certainly has the knowledge and experience necessary to understand the Release and be aware of his rights. The Release is plain, unambiguous, and easily understandable by someone of Wysocki's abilities. Wysocki had a period of twenty-one days to consider the Release, and a period of seven days to revoke acceptance after the date of execution. He was

advised in writing to consult an attorney. Finally, Wysocki received a severance payment in excess of $6,000.00 upon execution of the Release, proceeds he was not entitled to but for execution of the General Release.

Under these circumstances, IBM contends that there is no evidence to support Wysocki's argument that the Release is invalid. Wysocki does not deny the existence or validity of the Release. Other than his claim that more discovery is needed, Wysocki has not come forward with any evidence that the Release was not knowingly or voluntarily executed, or that it should not be enforced by the Court. Accordingly, the Court holds that the General Release was knowingly and voluntarily executed by Wysocki, and his claims under the USERRA against IBM are thus waived.

## IV. CONCLUSION

For the reasons set forth above, the Court hereby **ORDERS** as follows:

(1) IBM's motion to dismiss [DE # 14], construed as a motion for summary judgment, is **GRANTED**. All claims against IBM are hereby **DISMISSED WITH PREJUDICE**; and

(2) judgment in favor of IBM shall be entered contemporaneously with this Opinion & Order.

This January 26, 2009.

[SEAL] **Signed By:**

***Karl S. Forester*** [KSF]
**United States Senior Judge**

No. 09-5161

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE WYSOCKI,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINE CORPORATION, DOING BUSINESS AS IBM, INC.,

Defendant-Appellee.

ORDER

(Filed Aug. 13, 2010)

**BEFORE:** MARTIN, GUY, and MCKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER**
**OF THE COURT**

/s/ Leonard Green
**Leonard Green, Clerk**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

NO. 3:08CV-257-S

GEORGE WYSOCKI

Plaintiff

v.

INTERNATIONAL BUSINESS MACHINE CORPORATION
D/B/A IBM, INC.
One American Road, Room 612
Dearborn, Michigan 48126

Serve: CT Corporation System
Kentucky Home Life Building
Louisville, Kentucky 40202

Defendant

**VERIFIED COMPLAINT**

*"Electronically Filed"*

(Filed May 12, 2008)

* * *

Comes the Plaintiff, George Wysocki (hereinafter "Wysocki"), by and through counsel, and for his Verified Complaint against the Defendant, International Business Machines Corporation d/b/a IBM, Inc. ("IBM"), states as follows:

## JURISDICTION

1. That this action arises under the United States Constitution and under federal law, particularly Title 38 of the United States Code §§ 4301-4333 *et seq.*

2. That this Court possesses jurisdiction for this case under the provisions of Title 38 of the United States Code § 4223.

## FACTS

3. That the Plaintiff, Wysocki, is, and at all times relevant hereto has been, a resident of Versailles, Woodford County, Kentucky.

4. That the Defendant, IBM, is, and at all relevant times hereto has been, a foreign corporation incorporated in Armonk, New York with principal offices located at New Orchard Road, Armonk, New York and licensed to do and doing business in Lexington, Fayette County, Kentucky.

5. That Plaintiff is and was at all times material hereto a service member of the Armed Forces, specifically the Department of the Army, within the meaning and afforded the protections of 38 USC §§ 4301-4333.

6. That since 1979 and up to and including the date of the termination of his employment on October 15, 2007, Wysocki was employed continuously with IBM and/or Lexmark.

7. That Plaintiff has been deployed to active duty with the Department of the Army for a period that has not exceeded five years cumulatively, specifically, service in Operation Joint Forge, Bosnia (2001-2002), Operation Iraqi Freedom, Kuwait/Afghanistan/Iraq (2003), Operation Brightstar, Egypt (2005),

Operation Enduring Freeman, Afghanistan (2006-2007).

8. That Wysocki provided employer, IBM, with documentation and notice of his deployment to active military service for each and every deployment and further that the notice was received and acknowledged by the employer, IBM.

9. That Wysocki returned from Operation Enduring Freedom and his tour of duty in Afghanistan in July 2007 under honorable conditions and reported in a timely manner to his employer, IBM.

10. That upon his return, Wysocki learned that IBM would not permit additional training or assistance to him in an effort to reintegrate Wysocki into his position as a Database Administrator (DBA). Wysocki notified his supervisor that his skills had diminished without constant use during his deployment and that the ever changing programs, software and technology made required time to learn. Wysocki further informed his employer that on his previous reintegration to the work force, IBM would permit shadowing or assistance from other employees in an effort to allow the returning serviceman the ability to sharpen his skills. IBM refused assistance to Wysocki thereby violating the Uniformed Services Employment and Re-employment Rights Act ("USERRA") and discriminated against him in favor of employees that had not been called into military service.

11. That despite the knowledge and understanding of the USERRA the Defendant employer,

IBM, terminated the Plaintiff, Wysocki, without cause and in direct violation of the USERRA on October 15, 2007.

12. That Plaintiff is entitled to punitive damages in an amount sufficient to punish Defendant for its willful, wanton, oppressive, fraudulent, malicious and grossly negligent conduct.

13. That as a direct and proximate result of the direct violation of the USERRA and the discriminatory conduct by Defendant, Plaintiff has suffered, and continues to suffer, embarrassment, humiliation, mental anguish, loss of seniority, employment benefits, including healthcare benefits, loss of retirement benefits, bonuses, and loss of both past and future wages.

WHEREFORE, the Plaintiff prays for judgment from the Defendant as follows:

1. Judgment on his Complaint against Defendant;

2. Compensatory damages in the sum of $2,000,000.00, plus interest at the legal rate;

3. Punitive damages in the sum of $2,000,000.00;

4. Compensation for all lost benefits, past and future;

5. Trial by jury on any and all issues so triable;

6. For his costs herein expended, including reasonable attorney's fees; and

7. For any and all other relief to which he may otherwise be properly entitled.

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**VERIFICATION**

I, George Wysocki, hereby verify that I have read the foregoing Verified Complaint and it is true and correct to the best of my knowledge and belief.

s/ George Wysocki (w/permission)

STATE OF KENTUCKY )
)
COUNTY OF JEFFERSON )

Subscribed and sworn to before me by George Wysocki on this the ___ day of May, 2008.

My commission expires: August 19, 2010.

s/ Crystal G. Whalen
(w/permission)
NOTARY PUBLIC, KENTUCKY
STATE-AT-LARGE

Respectfully submitted,

ROMINES WEIS & YOUNG PSC

/s/ Lawrence I. Young

Lawrence I. Young
600 West Main Street
Suite 100
Louisville, Kentucky 40202
(502) 587-8822
(502) 568-3600 facsimile

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**
**FILED ELECTRONICALLY**

**CIVIL ACTION NO. 3:08CV-257-S**

**GEORGE WYSOCKI** **PLAINTIFF**

**V.**

**INTERNATIONAL BUSINESS MACHINES CORPORATION** **DEFENDANT**

## ANSWER AND COUNTERCLAIM

(Filed Aug. 3, 2008)

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The Defendant, International Business Machines Corporation ("IBM" or "Defendant"), by counsel, for its Answer to the Verified Complaint ("Complaint") of the Plaintiff, George Wysocki, states as follows:

### FIRST DEFENSE

The Complaint, or some part of it, fails to state a claim upon which relief can be granted.

### SECOND DEFENSE

1. The Defendant admits the allegation contained in numerical paragraph 1 of the Complaint that this action arises under 38 U.S.C. § 4301, et seq. and denies the remaining allegations contained in numerical paragraph 1 of the Complaint.

2. The Defendant admits the allegations contained in numerical paragraph 2 of the Complaint.

3. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint and therefore denies those allegations.

4. The Defendant admits the allegations contained in numerical paragraph 4 of the Complaint that the Defendant is a New York corporation for jurisdictional purposes and that it does business in Lexington, Fayette County, Kentucky. The Defendant denies the remaining allegations contained in numerical paragraph 4 of the Complaint.

5. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in numerical paragraph 5 of the Complaint and therefore denies those allegations.

6. The Defendant admits the allegations contained in numerical paragraph 6 of the Complaint that it employed the Plaintiff from July 9, 1979 until March 27, 1991, when the Plaintiff was part of a full-asset transfer to Lexmark, that it rehired the Plaintiff on May 6, 2002 and that the Plaintiff remained employed by it until October 15, 2007. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in numerical paragraph 6 of the Complaint and therefore denies those allegations.

7. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in numerical paragraph 7 of the Complaint and therefore denies those allegations.

8. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in numerical paragraph 8 of the Complaint and therefore denies those allegations.

9. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in numerical paragraph 9 of the Complaint and therefore denies those allegations

10. The Defendant denies the allegations contained in numerical paragraph 10 of the Complaint.

11. The Defendant admits the allegation contained in numerical paragraph 11 of the Complaint that it terminated the Plaintiff's employment on October 15, 2007. The Defendant denies the remaining allegations contained in numerical paragraph 11 of the Complaint.

12. The Defendant denies the allegations contained in numerical paragraph 12 of the Complaint.

13. The Defendant denies the allegations contained in numerical paragraph 13 of the Complaint.

14. The Defendant denies all other allegations contained in the Complaint that it has not expressly admitted in this Answer.

**THIRD DEFENSE**

The Complaint is barred by the Plaintiffs execution of a binding general release.

**FOURTH DEFENSE**

The Defendant relies upon the defenses of accord and satisfaction, payment and release, each of which is a bar to the Plaintiff's claim.

**FIFTH DEFENSE**

The Plaintiff's claims are barred by the equitable doctrines of waiver and estoppel.

**SIXTH DEFENSE**

The Defendant relies upon all applicable defenses that arise under or may be asserted pursuant to the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301-4333.

**SEVENTH DEFENSE**

The Plaintiff's recovery, if any, is limited to the remedies that are available under USERRA.

**EIGHTH DEFENSE**

Contrary to the allegations in the Plaintiff's Complaint, all employment decisions concerning the Plaintiff were based on legitimate, nondiscriminatory reasons. The Defendant expressly denies that any unlawful factor motivated it with respect to the employment decisions that are the subject of this action.

**NINTH DEFENSE**

Any award for lost wages or other benefits that the Plaintiff might otherwise be entitled to receive must be reduced by any income and the value of any benefits he has received or with reasonable diligence could have received during the period in which he seeks monetary relief.

**TENTH DEFENSE**

The Defendant relies upon the defense of failure to mitigate damages as a complete or partial bar to the Plaintiff's claims.

**ELEVENTH DEFENSE**

The Defendant relies upon all applicable constitutional, statutory and/or common law bars to and limitations on the award of punitive damages.

## TWELFTH DEFENSE

The Defendant reserves the right to add additional defenses as discovery proceeds.

**WHEREFORE**, having fully answered, the Defendant prays:

1. That the Court dismiss the Plaintiffs Verified Complaint with prejudice;

2. That the court enter judgment in favor of the Defendant;

3. That the Defendant recover from the Plaintiff all costs and expenses that it has incurred in this action, including, but not limited to, expert witness fees and expenses and reasonable attorneys' fees and expenses; and

4. That the Court award it all other relief to which it is entitled.

## COUNTERCLAIM

The Defendant, IBM, for its Counterclaim against the Plaintiff, George Wysocki, states as follows:

1. The Plaintiff, George Wysocki, was employed by IBM from May 6, 2002 until October 15, 2007.

2. IBM terminated the Plaintiff's employment on October 15, 2007.

3. On October 15, 2007, the Plaintiff voluntarily executed a general release ("Release") as part of an Individual Separation Allowance Plan that he negotiated with IBM.

4. As consideration for his execution of the Release, the Plaintiff received payment and benefits to which he would not otherwise have been entitled.

5. By his execution of the Release, the Plaintiff released IBM "its subsidiaries and affiliates, and its and their benefits plans . . . from all claims, demands, actions or liabilities [the Plaintiff may have against IBM of whatever kind, including, but not limited to, those that are related to [the Plaintiff's] employment with IBM, the termination of that employment, or other severance payments or your eligibility for participation in a retirement bridge, or claims for attorneys' fees." The Release further provide [sic] that it applies to "claims arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Worker Adjustment and Retraining Notification Act, and any other federal, state or local law dealing with discrimination in employment, including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status or age, and claims for your attorneys' fees."

6. The Defendant presents this claim for declaratory judgment pursuant to 28 U.S.C. § 2201, requesting the Court to order that the Plaintiff is

barred from pursing any claim against IBM, including his present claim, that is covered by the terms of the Release and to dismiss the present lawsuit with prejudice.

7. There is an actual controversy between the parties with respect to their respective rights and duties under the Release the Plaintiff executed.

**WHEREFORE**, the Defendant demands a judgment against the Plaintiff declaring that the Plaintiff is bound by the terms of the Release that he executed in favor of IBM on October 15, 2007 and a judgment against the Plaintiff that the claims contained in his Verified Complaint, filed herein on May 12, 2008 and alleging that IBM violated USERRA, are barred pursuant to the terms of the Release.

Respectfully Submitted,

/s/ Richard G. Griffith

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COUNSEL FOR DEFENDANT,
INTERNATIONAL BUSINESS
MACHINES CORPORATION

**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the below listed parties.

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COUNSEL FOR PLAINTIFF

/s/ Richard G. Griffith
COUNSEL FOR DEFENDANT

INDIVIDUAL SEPARATION ALLOWANCE PLAN
GENERAL RELEASE

(Filed Sep. 3, 2008)

YOU ARE ADVISED TO CONSULT AN
ATTORNEY BEFORE YOU SIGN THIS RELEASE

5A2966 10/15/07

If you feel that you are being coerced to sign this General Release (hereinafter "Release"), that your signing would for any reason not be voluntary, or you believe the process by which you have been offered this Release or the payment in exchange for this Release is discriminatory (see End Note 1 on the last page of this Release), you are encouraged to discuss this with your manager, or Human Resources before signing this Release. After reviewing the Release with your personal attorney, you may discuss any concerns you have with your manager or your personal attorney can contact IBM Legal Counsel. You should thoroughly review and understand the effects of the Release before signing it.

In exchange for the sums and benefits received pursuant to the terms of the Individual Separation Allowance Plan (ISAP) Wysocki, George (Insert Name of individual) (hereinafter "you") agrees to release and hereby does release International Business Machines Corporation, its subsidiaries and affiliates, and its and their benefits plans (collectively, hereinafter "IBM"), from all claims, demands, actions or liabilities you may have against IBM of whatever kind including, but not limited to, those that are

related to your employment with IBM, the termination of that employment, or other severance payments or your eligibility for participation in a retirement bridge, or claims for attorneys' fees.

You agree that this also releases from liability IBM's agents, directors, officers, employees, representatives, successors and assigns (hereinafter "those associated with IBM").

You agree that you have voluntarily executed this Release on your own behalf, and also on behalf of any heirs, agents, representatives, successors and assigns that you may have now or in the future. You also agree that this Release covers, but is not limited to, claims arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Worker Adjustment and Retraining Notification Act, and any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status or age, and claims for your attorneys' fees. You also agree that this Release includes, but is not limited to, claims based on theories of contract or tort, whether based on common law or otherwise. In addition, you agree to waive any right you have to pursue any claim or grievance through any IBM internal channel including, but not limited to, the IBM Open Door Policy. This Release covers both claims that you know about and those that you may not know about which have accrued by the time you execute this Release.

If you have worked or are working in California and Section 1542 of the Civil Code of California applies to you, the following applies to this release:

> You expressly waive the protection provided by Section 1542 of the California Civil Code which states:
>
> > "A general release does not extend to claims which a creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."
>
> Since you intend to release IBM and those associated with IBM of all claims, you agree to waive your rights, to the extent permitted by law, under Section 1542. In the event that you do not understand Section 1542 or its legal effect on you, you are advised to seek legal counsel,

This Release does not prevent you from enforcing your non-forfeitable rights to your accrued benefits (within the meaning of Sections 203 and 204 of the Employee Retirement Income Security Act of 1974, as amended), as of the date of termination of your IBM employment, under the IBM Personal Pension Plan or the IBM Retirement Plan as applicable and the IBM Savings Plan which are not released hereby but survive unaffected by this document. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission.

You acknowledge and agree that:

1. The payment and benefits provided pursuant to the Individual Separation Allowance Plan constitute consideration for this Release, in that they are payments and benefits to which you would not have been entitled had you not signed this Release.

2. You have been given the opportunity to take a period of at least twenty-one (21) days (regardless of how many days you are still on payroll) within which to consider this Release and to review all documentation associated with the ISAP provided to you by IBM, and IBM expects that you will take the full 21 days to consider them. In the event you execute this Release before that time, you certify, by such execution, that you knowingly and voluntarily waived the right to the full 21 days, for reasons personal to you, with no pressure by any IBM representative to do so.

3. This Release does not waive any claims that you may have that arise after the date you sign this Release.

4. You have not relied on any representations, promises, or agreements of any kind, whether written or oral, made to you in connection with your voluntary decision to accept the ISAP, except for those set forth in the ISAP Summary Plan Description.

5. In the event of rehire by IBM or any of its subsidiaries as a regular employee, you understand that IBM reserves the right to require repayment of a prorated portion of the ISAP payment. The amount of

repayment will be calculated as one week of pay at the rate used to calculate the payment multiplied by the difference between the number of weeks used to calculate the ISAP payment and the number of weeks away from IBM, less an appropriate portion of the payroll taxes associated with the payment withheld by IBM.

6. If at any time of executing this Release you are on a retirement bridge or leave of absence, this Release also waives any rights that you may have regarding your retirement bridge or leave of absence – including, but not limited to, return rights, whether or not statutory.

7. You acknowledge your obligations to IBM regarding IBM's intellectual property, and further acknowledge that these obligations continue after your employment with IBM terminates.

8. You agree that for one year following the termination of your employment, you will not directly or indirectly: a) hire, solicit or make an offer to any employee of IBM to be employed or perform services outside of IBM; or b) solicit for competitive business purposes any customer of IBM with which you have been involved as part of your job responsibilities during the last year of your employment with IBM.

This Release is not effective or enforceable for seven days (fifteen days in Minnesota) after you sign it, and you may revoke it during that time. To revoke, you agree to deliver the gross ISAP payment less associated payroll taxes withheld by IBM (the sum), and a

written notice of revocation to your manager or the Human Resources Manager responsible for your location. This must be done prior to the conclusion of the seventh day (fifteenth day in Minnesota) after you sign the Release.

If your manager, or the Human Resources Manager responsible for your location, does not receive a written revocation and the sum referenced above by the end of the seven day period (fifteen days in Minnesota), this Release will become fully enforceable at that time. Revocation of this Release does not alter or change the termination of your employment by IBM.

In case any part of this Release shall be invalid, illegal or otherwise unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

You hereby acknowledge that you understand and agree to this General Release.

Wysocki, George — Name (Print)

5A2966 — Serial #

/s/ George Wysocki — Signature

Corey Allen — IBM Witness (Print name and employee serial number) or Notary Public (if not witnessed by IBM employee)

/s/ Corey Allen — IBM Witness or Notary Public Signature

10/15/07 — Date

End Note 1: The Age Discrimination in Employment Act prohibits employment discrimination based on age and is enforced by the Equal Employment Opportunity Commission (EEOC). Other federal laws prohibit discrimination in employment based on sex, race, color, national origin, religion, disability, or veteran status. These laws are enforced by the EEOC and the U.S. Department of Labor. There are also state and local laws prohibiting discrimination, which are enforced by state and local human rights agencies.